

March 10, 2017

House Judiciary Committee  
Chair Rep. Claman  
Vice-Chair Rep. Fansler  
Rep. Kreiss-Tomkins  
Rep. Eastman  
Rep. Kopp  
Rep. Reinbold  
Rep. Millett  
Rep. Stutes

Mr. Chairman and Members of the House Judiciary Committee,

Thank you for the opportunity to testify on HB 69, the bill to repeal the Alaska Workers' Compensation Appeals Commission (AWCAC or the Commission).

I know your time is limited and valuable so I will be succinct.

I want to make three points about the Commission. First, the Commission decisions over the last 11 years show a distinct and clear bias against injured workers and in favor of insurance companies. It is not a fair or balanced tribunal. Second, the Commission does not do very much work compared to other appeals courts. You get very little bang for your ½ million bucks. Third, the Commission has not brought the uniformity and clarity to workers' compensation law that was promised. Often the Commission decisions create more confusion.

I have given the Committee staff an 18-page packet of information backing up and supporting these points, with tables, data, and a complete list of cases.

### **COMMISSION DECISIONS ARE OVERWHELMINGLY IN FAVOR OF INSURANCE COMPANIES**

This is a contentious point so I want to be clear on the numbers and cases I am using to prove it.

I reviewed the breakdown provided to this committee by former Commissioner Andy Hemenway and talked to him by phone about his research. I generally agree with his numbers and conclusions. We agree that the Commission has decided 229 cases and 100 have been appealed to the Alaska Supreme Court. He states that 39 of these cases result in decisions as opposed to dismissals or other action short of decisions and 5 cases are pending.

I have been able to find 36 of these decisions and take his word that there are 3 more out there, likely old unpublished MOJ opinions that are, being old and unpublished, harder to find. So basically, Mr. Hemenway and I agree on the cases and the data.

He concludes that the Commission has a reversal rate around 50% and I believe has testified before this Committee that this is comparable to the superior court reversal rate. I have no reason to doubt him on these points.

I asked a different question, namely how often does the Commission rule for injured workers and how often for insurance companies? Specifically, how often does the Commission get it right?

I have reviewed each of the 36 decisions preparing for today's testimony. Five of the published opinions are not on the merits of employee benefits but concern other issues, for instance Harris was about whether a gay couple had rights under the Act, a question the Commission cannot decide, and Titan was about an employer who was fined for failing to get workers' compensation insurance. Removing these 5 left me with 31 decisions on employee benefits.

In the attachment to this letter, I noted whether the Board, the Commission, and eventually the Supreme Court substantially ruled in favor of the employee or the insurance company in each of the 31 cases. (In two cases the result was mixed and I noted that, counting it as a split.)

In these cases, the Commission ruled in favor of insurance companies over 85% of the time.

In the 13 cases where the insurance company position was wholly or mainly affirmed by the Supreme Court, the Appeals Commission ruled for the insurance company in all 13. The Commission is very good at spotting when the insurance company should win.

In the 18 cases where the employee's legal position was correct, the Commission ruled in favor of the employee in only 3.5 cases or less than 20%. The Board in these decisions was correct exactly 50% of the time. The conclusion from this data is that even where the employee is entitled to benefits, the Commission will rule for the insurance company over 80% of the time.

So how can Mr. Hemenway be right that the Commission has generally a 50% reversal rate? Simple. The Commission almost always rules for the insurance company and they are right half the time. The Board and the Supreme Court take a much more balanced approach. But the Commission reaches largely the same conclusion regardless of the merits. When the insurance company has the better argument, the Commission rules in their favor 100% of the time. When the injured worker has the better argument, the Commission still rules for the insurance company over 80% of the time. It does not let the facts get in the way.

This conclusion supports what I have seen as a practicing attorney representing injured workers. I counsel my clients that they have almost no chance of winning at the Commission regardless of the merits of their case. The deck is simply too stacked against them. Even when their legal position is correct, they lose 4 out of 5 times before the Commission.

## **THE COMMISSION DOES NOT DO MUCH WORK**

Mr. Hemenway noted that the Commission has issued 229 decisions in its 11-year history.

In the attachment, I list the number of decisions issued per year. This is an average of just under 21 decisions per year. But the number of decisions issued has been falling for some years. Over the first 5 years, the average was just under 29 per year. (Because the Commission was formed in November 2005, these are included in 2006.) Over the last five years, from 2011 thru 2016, the average number of decisions issued per year has been under 14 per year. That is about one per month.

As a point of comparison, I counted the number of decisions issued in the last 8 months by both the WC Commission and the criminal Court of Appeals, another 3-member appeals panel in Alaska. In that period, the Criminal Court of Appeals issued 114 decisions or about 14-15 per month. There are 3 attorneys on this court, so each was writing about 4-5 opinions per month. In that same period, the WC Commission issued 7 decisions, or less than one per month. Put simply, each member of the Court of Appeals did about 5 times as much work as the AWCAC Commissioner.

## **THE COMMISSION HAS NOT PROVIDED THE LEGAL CLARITY PROMISED**

Part of the original justification for the Commission was that it could provide consistent and reliable legal precedents for the Board to follow. This has not come to pass. The Commission decisions often lack clarity and sometimes create confusion themselves. In Hudak v. Pirate Airworks, Inc., the Commission denied a petition for review without adequate explanation and the Supreme Court was forced to order the Commission to explain itself. In Thurston v. Guys with Tools, 217 P.3d 824 (Alaska 2009), the Commission decision was so difficult to understand that the Supreme Court granted an appeal to clarify the law. This is the job the Commission was supposed to perform.

Sometimes the Commission doesn't seem to read its own decisions. An important issue in workers' compensation is who pays medical bills for injured workers when they win at the board and the insurance company appeals. On January 25, 2012, the Commission issued a unanimous decision that the injured worker, in this case a firefighter with cancer, should receive medical benefits pending appeal unless the insurance company can show a "likelihood of success on the merits". Six days later, on January 31, 2012, in another case, the Commission ruled unanimously that the insurance company only needed to show "serious and substantial legal questions" and denied medical benefits pending appeal. Within one week, the Commission had used two very different legal standards to address the same question. The Alaska Supreme Court was forced to grant petitions for review in both cases, consolidate them, and issue a ruling clarifying the correct rule of law. Adamson v. MOA, 301 P.3d 569 (Alaska 2013).

Not only does the Commission not clear up the law, it sometimes confuses it further, even contradicting itself.

In conclusion, the Commission has a very clear bias in favor of insurance companies, does not do much work compared to other appeals courts, and has brought confusion rather than clarity to the law. The repeal of the Commission is long overdue. Please vote to repeal it and allow injured workers a fair chance in appeals of Board decisions.

Thank you for your time.

Sincerely

Eric Croft